UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
CHARLES R. BREYER, JUDGE

UNITED STATES OF AMERICA, PLAINTIFF, VS. REGINALD AKINS, DEFENDANT.	NO. CR-01-0435 CRB

WEDNESDAY, MARCH 8, 2006
SAN FRANCISCO, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Joan Marie Columbini, CSR 5435
OFFICIAL COURT REPORTER

Proceedings; Wednesday, March 8, 2006

The clerk: Calling case CR 01-0345, the United States of America versus Reginald Akins.

Appearances, counsel.

Ms. Badger: good afternoon, your Honor. Susan Badger on behalf of the United States.

Ms. Moorman: Good afternoon, your Honor. Ann Moorman on behalf of Reginald Akins. He will be present. He is in custody.

(the Defendant entered the courtroom)

The Court: Okay. Let the record reflect the Defendant is present.

The Government takes the position that I have no discretion other than to impose the sentence that had previously been imposed. That's their position?

Ms. Badger: That's correct, your Honor.

The Court: And they cite to that United States versus Dare, a two-to-one decision, which essentially relied on Harris, which, as the dissent points out in Dare, is probably Not good law, but, nevertheless, the Ninth Circuit held that I had to follow the law, Harris as law.

you suggest, if I understand your memoranda correctly, that there really isn't a conflict because could find now that Mr. Akins didn't brandish a weapon, as that Term

is defined. I think that's essentially your argument, that I can make a finding that he didn't?

Ms. Moorman: Yes.

The Court: Well, the problem with that is I can't. I already made a finding that he did and that finding went up to the Ninth Circuit and was upheld. I can't just change -- I can't say, well, in light of that, I changed my mind, I didn't make the finding. I found it. You may disagree with the finding, but I found it. It's there. I decided it. I don't have all the evidence in mind two years later, but I don't think I was in doubt as to whether or not Mr. Akins brandished a weapon.

I made that finding. The finding is part of the case. It went to the Ninth Circuit. It was affirmed. I still think I'm right. It was affirmed, and now it's back here for sentencing.

The odd thing is why would they send this case back to me if I didn't have discretion to enter a different sentence? I would enter a different sentence. I mean, I think under all the circumstances and if I were to apply 3663(a) to the sentencing, I may very well enter a different sentence if I had discretion to do so. I don't think I do. I may be wrong. as a matter of fact, I hope I'm wrong, but I'm issuing an opinion today saying that I'm right -- or I don't know I'm saying I'm right. I'm saying I don't think I have discretion.

I agree with the Government's analysis and especially under U.S. v. Dare, I think my discretion is -- I think this issue is directly decided by Dare and by two-to-one vote. Dare is the law. Harris is the law. And there's no question the Ninth Circuit is the law. So under all of that, I don't feel I have discretion to enter a different sentence.

If I am wrong -- and I invite you to appeal. If I'm wrong, they'll send it back with instructions as to what I should do, which is fine.

I don't think it's prejudicing the Defendant because he's serving a rather lengthy sentence in any event. It's prejudicing him in the sense I'm not doing what you're asking me to do, but it's not going to result in some additional time as a result of the appeal.

So I think that's the direct way to handle your submission. I will sign an order today, and you can take it up or across, whichever direction one goes from here to the Ninth Circuit.

Ms. Moorman: For the record, your Honor, the objections that we preserved in this proceeding since the remand, were that, one, yes, this court does have the discretion to re-sentence Mr. Akins within the scope of the remand to a five-year mandatory minimum on count three rather than the seven.

I understand your ruling, and I accept it. But we

did also preserve for the record whether Harris is remains good law in light If United States versus Booker and the Blakely and Apprendi opinions as they have been interpreted, and so we will be accepting your invitation to take the matter up.

The Court: Be my guest. Thank you.

Ms. Moorman: Thank you.

Ms. Badger: Thank you, your Honor.

(Proceedings Adjourned.)

CERTIFICATE OF REPORTER

I, Joan Marie Columbini, Official Reporter for the United States Court, Northern District of California, hereby Certify that the foregoing proceedings in CR 01-0435 CRB, United States of America v. Reginald Akins, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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JOAN MARIE COLUMBINI, CSR 5435, RPR

MONDAY, APRIL 24TH, 2006